

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Acting Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton; and
Tony Hammond

Public Inquiry Concerning the
Terms of 39 U.S.C. 404(d)

Docket No. PI2016-2

ORDER CONCLUDING PROCEEDING

(Issued August 8, 2016)

I. INTRODUCTION

On December 10, 2015, the Commission established this proceeding to invite public comment on the interpretation of terms related to the Commission's jurisdiction over Postal Service closings and consolidations of post offices pursuant to 39 U.S.C. § 404(d).¹ Upon review of the comments and further consideration, the Commission concludes that at this time no further proceedings in this inquiry are necessary and this docket will be closed.

¹ Notice and Order Seeking Comments on Commission Jurisdiction over Postal Service Determinations to Close or Consolidate Post Offices, December 10, 2015 (Order No. 2862).

II. BACKGROUND

The Commission is authorized to review appeals from Postal Service determinations to “close or consolidate any post office.” 39 U.S.C. § 404(d)(5).² As contemplated in prior Commission orders on review of Postal Service closing actions, the Commission sought to obtain comments from interested persons about the extent of the Commission’s authority to review Postal Service decisions regarding relocations and rearrangements of postal retail facilities, as well as the Postal Service’s decisions to close contract postal units (CPUs).³

Order No. 2862 initiating this inquiry requested comments on: 1) what constitutes a relocation or rearrangement of postal services and is thus exempt from Commission review pursuant to section 404(d); and 2) when, or if, the Commission should have jurisdiction to review the closing or consolidation of a CPU, particularly the application of the sole source standard providing for Commission jurisdiction over closing of certain CPUs. Order No. 2862 at 2. The Commission also asked for comment on whether its regulations in 39 C.F.R. part 3025 and their application by the Commission in prior orders interpreting the statute and regulations are sufficiently clear. *Id.* at 4.

² Section 404(d)(5) requires the Commission to review a Postal Service determination to close or consolidate any post office on the basis of the record that is before the Postal Service. It further provides that the Commission shall set aside any determination or findings and conclusions it finds to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (B) without observance of procedure required by law; or (C) unsupported by substantial evidence in the record. Should the Commission set aside any such determination or findings and conclusions, it may remand the entire matter to the Postal Service for further consideration. Section 404(d)(5) does not, however, authorize the Commission to reject or modify the Postal Service’s determination by substituting its judgment for that of the Postal Service.

³ See Docket No. A2013-5, *Glenoaks Station Post Office*, Burbank, California, Order No. 1866, Order Affirming Determination, October 31, 2013; Docket No. A2015-2, *Careywood Post Office*, Careywood, Idaho, Order No. 2505, Order Dismissing Appeal, May 27, 2015.

III. CONSIDERATION OF COMMENTS

The Commission received nine initial comments⁴ and four reply comments.⁵ The Commission has carefully reviewed the comments and reply comments filed in this proceeding and appreciates the many thoughtful suggestions and opinions expressed by the participants. The comments are helpful to the Commission and may be useful in deciding future cases and issues regarding Postal Service determinations to close or consolidate postal facilities.

The comments also inform the Commission's preparation of its upcoming Report to the President and Congress pursuant to section 701 of the Postal Accountability and Enhancement Act (PAEA) of 2006.⁶ Section 701 directs the Commission to submit a report every five years regarding the operation of the amendments made by the PAEA and make recommendations to improve the effectiveness and efficiency of the postal laws. In its first Section 701 Report, the Commission recommended that Congress clarify the scope of the Commission's appellate review of Postal Service decisions to

⁴ United States Postal Service Comments on the Interpretation of Terms Related to 39 U.S.C. § 404(d), February 5, 2016 (Postal Service Comments); Initial Comments of the National Association of Postmasters of the United States on the Commission's Ability to Review Postal Service Determinations to Close or Consolidate Post Offices, February 5, 2016 (NAPUS Comments); Initial Comments of the Association of United States Postal Lessors Regarding the Jurisdiction of the Postal Regulatory Commission with Respect to Post Office Closings, February 5, 2016 (AUSPL Comments); Initial Comments of Steve Hutkins on the Commission's Jurisdiction Over Post Office Closings, February 4, 2016 (Hutkins Comments); Comments by Mark I. Jamison Regarding Commission Jurisdiction Over Postal Service Determinations to Close or Consolidate Post Offices, January 27, 2016 (Jamison Comments); Comments of Elaine Mittleman on the Commission's Jurisdiction to Review Postal Service Determinations to Close Post Offices, February 5, 2016 (Mittleman Comments); Letter from David J. Faimon, CFO, Credit Management, to Robert Taub, January 21, 2016; Comments of David B. Popkin, February 5, 2016 (Popkin Comments); Public Representative's Comments on the Commission's Ability to Review Postal Service Determinations to Close or Consolidate Any Post Office, February 5, 2016 (PR Comments).

⁵ United States Postal Service Reply Comments on the Interpretation of Terms Related to 39 U.S.C. § 404(d), March 29, 2016; Reply Comments of Steve Hutkins on the Commission's Jurisdiction Over Post Office Closings, March 29, 2016 (Hutkins Reply Comments); Reply Comments of the National Association of Postmasters of the United States, March 29, 2016 (NAPUS Reply Comments); Public Representative's Reply Comments on the Commission's Ability to Review Postal Service Determinations to Close or Consolidate Any Post Office, March 29, 2016 (PR Reply Comments).

⁶ Pub. L. 109-435, 120 Stat. 3198 (2006), section 701.

close postal-operated retail facilities by adopting the plain meaning of the term post office which would include stations and branches.⁷ The comments received in this proceeding will be considered by the Commission together with comments received in the separate docket established to receive input from interested persons for the next Section 701 Report.⁸

The participants' comments represent a wide range of viewpoints. The Postal Service continues to maintain that the Commission lacks jurisdiction to review the closing of stations, branches, and CPUs and that the Commission should give deference to definitions in the Postal Service's regulations relating to post office closings. Postal Service Comments at 1-9. Other commenters counter that there is no reason to defer to the Postal Service's narrow definitions of post office closings. Hutkins Reply Comments at 2-7, PR Reply Comments at 1-7, NAPUS Reply Comments at 1-2.

Several commenters urge the Commission to interpret its authority to review appeals of post office closings as broadly and robustly as legally justified and to include the general public to the greatest extent possible. Jamison Comments at 2, 4, 6; Hutkins Comments at 5; Mittleman Comments at 8; AUSPL Comments at 5. Commenters point out that the words relocation and rearrangement do not appear in the statute, suggesting that grounds for either denying or accepting jurisdiction over relocations or rearrangements are not found in section 404(d). Hutkins Comments at 12-13; Postal Service Comments at 16. However, many commenters believe post office relocations, which transfer the same level of effective and regular service and the same number of Postal Service-operated facilities within a community, are not post office

⁷ Postal Regulatory Commission, Section 701 Report, Analysis of the Postal Accountability and Enhancement Act of 2006, September 22, 2011, at 78.

⁸ See Docket No. PI2016-3, Order No. 3238, Notice and Order Seeking Comments on Report to the President and Congress Pursuant to Section 701 of the Postal Accountability and Enhancement Act, April 14, 2016, at 8.

closings. PR Comments at 9; PR Reply Comments at 14-15; AUSPL Comments at 3, 5; Postal Service Comments at 13, 16.

Several commenters believe rearrangements should be subject to Commission review. Hutkins Reply Comments at 19; Mittleman Comments at 7; NAPUS Comments at 3; AUSPL Comments at 2, 3. However, the Public Representative asserts rearrangements should be limited to improving community access to retail services. PR Comments at 8; PR Reply Comments at 12-13. The Postal Service states that the Commission's determinations that it does not have jurisdiction to review rearrangements recognizes appropriate jurisdictional boundaries. Postal Service Comments at 13, 16.

As for the sole source test as a basis for Commission review authority over CPU closings, some commenters favor a reversion back to early appeals cases where the Commission stated that it had jurisdiction to review all CPU closings. Hutkins Reply Comments at 13; AUSPL Comments at 6 (adopting Hutkins Comments). Other commenters note that there is nothing in the statute authorizing Commission jurisdiction to either review CPU closings or apply a sole source test. Postal Service Comments at 11-12; AUSPL Comments at 4. Some commenters object to consideration of an expanded geographic range of a community to meet the sole source test, while the Postal Service, on the other hand, favors taking into account available alternate access channels for postal services in nearby areas as part of the sole source test. Hutkins Comments at 27; AUSPL Comments at 4, 5; Postal Service Comments at 16.

Certain commenters favor the issuance of Commission guidelines or definitions within the Commission's regulations. Popkin Comments at 2; Hutkins Comments at 34. The Public Representative urges the Commission to avoid using specific hypotheticals as a basis for jurisdiction. PR Comments at 9.

The Commission has carefully considered all of the comments received in this docket, which represent a wide variety of opinions on the matter. The Commission values the commenters' participation and perspectives, and their relative views may inform the Commission's work moving forward. At this time, however, the Commission does not plan any further action in this inquiry and the proceeding will be closed.

IV. UNTIMELY FILINGS

Pending in this docket is a motion to supplement the record filed by Elaine Mittleman on April 15, 2016.⁹ Ms. Mittleman also filed supplemental comments on February 17, 2016, that were not accompanied by a motion for leave to file.¹⁰

In Order No. 2862, the Commission established a procedural schedule for this proceeding. See Order No. 2862 at 10. The due date for filing initial comments was extended until February 5, 2016, and the due date for reply comments was extended until March 1, 2016.¹¹ The deadline for filing reply comments was later extended until March 29, 2016.¹² Ms. Mittleman filed a motion to extend the time for reply comments for an additional two weeks. That motion was denied on April 7, 2016.¹³ In Order No. 3220, the Commission concluded that apart from failing to justify her request for extension, the request “would potentially prejudice the other parties, who filed their reply comments in a timely fashion” and that the extension could “unfairly afford Ms. Mittleman the benefit of the work and arguments presented in the other parties’ filings.” *Id.* at 4-5.

With respect to Ms. Mittleman’s April 15, 2016 Motion to Supplement, she contends, among other things, that the supplement is necessary to respond to confusing and factually incorrect statements. See Motion to Supplement.

⁹ Motion of Elaine Mittleman to Supplement the Record, April 15, 2016 (Motion to Supplement).

¹⁰ Supplemental Comments of Elaine Mittleman on the Commission’s Jurisdiction to Review Postal Service Determinations to Close Post Offices, February 17, 2016 (Supplemental Comments).

¹¹ Order No. 3054, Order Granting Motion to Extend Comment Deadline, January 28, 2016.

¹² Order Granting Motion for Extension of Reply Comment Deadline, February 24, 2016, at 2 (Order No. 3097).

¹³ Order No. 3220, Order Denying Motion for Extension of Reply Comment Deadline, April 7, 2016. See Motion of Elaine Mittleman for Extension of Time to File Reply Comments, March 29, 2016.

The Postal Service opposed the Motion to Supplement, asserting that it was an attempt to circumvent Order No. 3220.¹⁴ Ms. Mittleman's motion does not demonstrate new facts to justify her attempt to disregard established filing dates to file additional argument and documents after the Commission denied, on April 7, 2016, her first motion for an extension of time to file reply comments. Moreover, in her Supplemental Comments, Ms. Mittleman attempts to again raise substantive issues surrounding the long-closed Commission appeals proceedings where she was a petitioner. See Supplemental Comments.

Filing dates are established in Commission proceedings to accord a degree of fairness to participants. Ms. Mittleman's request would potentially prejudice the other parties and could unfairly afford Ms. Mittleman the benefit of seeing the arguments presented by the other participants in advance of her own reply. Cut-off dates for filings are also established to allow the Commission to commence a structured review of the matters involved, regardless of whether the proceeding is a formal adjudication or rulemaking, or a less formal inquiry docket.

For these reasons, Ms. Mittleman's Motion to Supplement the record is denied.

Regarding Ms. Mittleman's Supplemental Comments filed on February 17, 2016, concerning the Pimmit Branch closing, this filing was unaccompanied by any motion requesting leave to file. See Supplemental Comments. Because no motion was filed for leave to submit these supplemental comments at a date after the established filing date, they will be disregarded.

¹⁴ United States Postal Service Opposition to Motion of Elaine Mittleman to Supplement the Record, April 25, 2016 (Postal Service Opposition). The Postal Service filed a motion for leave to file the opposition. United States Postal Service Motion for Leave to File an Opposition to the Motion of Elaine Mittleman Seeking to Supplement the Record, April 25, 2016. The Postal Service's motion for leave to file is granted.

V. ORDERING PARAGRAPHS

It is ordered:

1. The Motion of Elaine Mittleman to Supplement the Record is denied.
2. Docket No. PI2016-2 is closed.

By the Commission.

Ruth Ann Abrams
Acting Secretary